who picked it up at Pittsburgh wanted to go to New York so he parked the trailer and went to New York. Two weeks later they were still looking for the trailer loaded with steel and for the driver."

The members of our association or union are unalterably opposed to the continuous practice of trip-leasing. They take the position that the leasing of equipment without manpower is one problem, and that of leasing with manpower is quite a different one. Now, as we pointed out, there is nothing to stop them, under this law, from leasing equipment or for a trip-lease or anything else. But the Commission says, (and after all, their judgment ought to be better than the people who are practicing) they say, in order to enforce the safety rules, in order to maintain proper standards, that they have got to do what they have suggested here in order to properly regulate the industry.

Judge Kerner: Senator, can't you assume that we will read all that?

Senator Wheeler: (For the Teamsters Union) Well, I assume you will, but I think it is necessary in order to get [fol. 385] a clear understanding of what the law is, because as a matter of fact, it is the facts that make the law.

Now, Mr. Ellis said this morning that he was not going to argue the facts. I don't blame him for not wanting to argue the facts. I wouldn't want to argue the facts if the facts in the case were against me—were as they are now. As somebody said, "When the facts are against you, argue the law; when the law is against you, argue the facts." Well, I wanted to call attention to the facts in these cases.

Judge Kerner: Did you finish that story, Senator? "When both are against you, just try the lawyer."

Senator Wheeler: (For the Teamsters Union) Yes, abuse the other side. Well, here is one other one that I will call to your attention. We were in favor of eliminating trip-leasing between authorized carriers; excepting between authorized carriers, it does not feel a carrier can engage in trip-leasing from itinerant trucks and still comply with the Commission's regulations. If you went through these, I think if you all take the Appendix and read that, you [fol. 386] will get the facts without having to go through

all the testimony within; but it is replete with statements of all kinds of this character. The Teamsters Union produced some witnesses, some of them who had been engaged in trip-leasing. They told of abuses. The testimony shows also that some of these people said that they didn't know whether or not a man had worked more than ten hours. They had to take his word for it. They didn't know if he had a doctor's certificate, and if he did, they didn't know who the doctor was. As I say, it simply makes it impossible for them to regulate the industry unless they have this power.

Now, have they got the power? As I said, I will call attention to the policy laid down saying what they should do. Now, I call attention to Section 202(a), which provides:

> "The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation * * *"

[fol. 387] Now, when the bill first came before the Senate—before the Committee, that provision was not in there with reference to the "procurement of and the provision of facilities for such transportation." That is when the Coordinator submitted his bill. That was not in it. But after listening to the testimony with reference to what was taking place with some of them—They were called brokers at that time; but the broker of that time was the same as the man who today owns no equipment at all. The testimony for instance showed the President of the American Trucking Association does millions of dollars worth of business all over the Northeast. When I cross-examined him as to how many trucks he owned, he said he owned a good many. I said, "You understand what I mean by the term 'own'; how many do you actually own?" Well, he quibbled a long time and finally he said that he owned one, a 1939 second-hand Chevrolet truck. Now, the question is whether a man who does that, is he fit to have the common carrier certificate? I say that he is not fit and neither is he fit nor is he able to conduct a business. Supposing some aircraft company appeared—somebody

wanted a certificate as an aircraft carrier, and he went [fol. 388] before the Commission and said, "I want to get into this business. Now I haven't any—I haven't any equipment to repair the planes; I haven't any garage; I haven't any inspectors, but I can go out and get the business and I can lease airplanes." Do you think, for one moment that any Commission under the sun would permit a man of that kind to come in?

Now the only reason some of the people got in was because of the fact they came in under the "grandfather clause," and they had one truck and then they went out and leased some others.

I say, instead of the Commission being arbitrary; as a matter of fact, the criticism of the Commission, the criticism of the Commission, both in the halls of Congress and by the public itself has been that the Commission didn't act and didn't even go so far as to take away the certificates of some of these carriers who owned nothing—own nothing! They are nothing more than brokers and yet they are exploiting a lot of these people and forcing them to drive all hours of the night. That is the reason the Commission had to take measures that they did so that they could prohibit this sort of thing; and to come in and say that they [fol. 389] have acted arbitrarily and capriciously, it is ridiculous, in my judgement.

Now, it showed that again in Section 204 (a), "It shall be the duty of the Commission——

> "(1) To regulate common carriers by motor vehicle as provided in this part and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment."

Now, the Commission simply says they cannot do those things unless they can regulate these so-called "gypsies" or itinerants. Now in Section 204 (a) 6, the law says——

> "To administer, execute and enforce all the provisions of this part, to make all necessary orders in con-

nection therewith and to prescribe rules, regulations and procedure for such administration."

There is a broad regulation saying that that is the duty, to enforce all of these provisions. What were the provisions?

(1) To carry out the National Transportation Policies laid down originally in the Act, and
[fol. 390] (2) To go ahead and say that they should regulate the procurement, the procurement of vehicles by any of these common carriers.

Then they turn to Section 208 (a), and they said that this provision:

"Provided, however, that no terms, conditions or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require."

Now, I was handling the bill on the floor of the Senate. It was a very highly controversial bill, both in 1935 and in 1940. It was bitterly fought by various groups of people each time. I struck out, or the Committee struck out the provisions giving them the right to add "terms, conditions and limitations"; but because of the fact that there were complaints, saying what? They complained and said that 'we don't want to have to come to the Commission every time we buy a new truck.' That was the objection to it. So they said in some of the State commissions they had to go to the State Commission every time they wanted to get [fol. 391] a new truck, in some of the State commissions. So we struck it out and said that there should be no conditions or limitations, no terms or conditions, to restrict the right of the carrier to substitute or add within the scope of the permit, or to add to his or its equipment and facilities within the scope of the permit "as the development of the business and the demands of the public shall require."

Now, if the contention is put on that that some of these people would have you believe, then it would mean that

because of that, the Commission not only didn't have any right to regulate itinerants or "gypsies," but they wouldn't have any right to regulate any other provisions of the—They wouldn't be able to say to them, "Now you can't have a certain type of truck; you can't have this and you can't have that." Well, of course, no such intention was ever the intention of the Congress at all.

Again, another provision which is in the briefs and which is called attention to, is where another provision was left out. Senator Truman, who is now President, was on this bill with me, and he explained this other provision and [fol. 392] said that there was no intention of changing the policy of the bill, and that is set forth in the briefs. Now, I could go ahead and take a lot more of your time, the Court's time, in presenting something of the issues in the case, but we have set them forth in our brief, and likewise, the railroads have, and the Commission has set them forth.

Judge Kerner: I think the matter has been very well briefed with all these briefs. We will have something to do.

Senator Wheeler: (For the Teamsters Union) I do think that in order to get a clear picture of what the purpose of the Act was, that it is necessary to examine the facts, because without examining the facts as to what took place and the history of the legislation, no one——

Judge Kerner: (Interposing) We will examine the facts, and I am very glad to know that they are not in controversy here; they are not disputed. That is going to be interesting. That will save us a lot of time.

[fol. 393] ORAL ARGUMENT FOR INTERVENING TRUCK LINES

Mr. Franklin R. Overmyer (For Intervening Truck Lines): May it please the Court, I was granted leave to intervene on behalf of a number of motor carriers who, like the plaintiffs, have certificates of convenience and necessity issued by the Interstate Commerce Commission. I would like my position to be clear.

I believe the rules of the Commission insofar as they prohibit trip leasing are entirely within their power, are

needful in order to correct evils within the industry, but I do depart from their reasoning when they say that if an owner operator is brought into the service of a carrier, he may not be paid upon a percentage of the revenue. As far as that particular feature is concerned, that if the owner operator is brought in on a long-term lease, such as the rules provide, the evils will be corrected. It seems to me that the problem——

Judge Kerner (Interposing): Your idea is this rule does correct the evil?

Mr. Overmyer (For Intervening Truck Lines): Definitely the rules do, and the Commission had the power to [fol. 394] prescribe them. I think the Commission has labored a long time and had the benefit of many, many cases before it that brought individual aspects of the problem, and I think climaxed by this hearing, was adequately informed what the evils were, and it is its wisdom and judgment however much we may differ from it that must control because Congress has commended that power to it.

I don't believe the differences on objections between the defendant and plaintiff are so great, but we depart, therefore, on the question of the method, and the method is peculiarly the Commission's province to prescribe. It should be clear, that knowing its views, we are going to be challenged by formidable organizations including the Department of Agriculture and the National Industrial Traffic League, and that the Commission was very careful as to whether or not it had the power and whether or not it was reasonable in the rules prescribed. I think myself it not alone had the power but the rules prescribed are reasonable, and I think in turn they will correct an evil [fol. 395] which I think goes within the industry such as we have seen, causing great disturbance to the common carriers.

The Commission had the power to approach this problem under the authority given to it, either as a safety measure or as an approach to bring about stability within the industry and for the carriers.

Now, there has been given to you many of the details pertaining to the safety of the operations, those aspects of

and practices prior to the war. However, as it stated in its report, "During the war, directives of the Office of Defense Transportation, and our orders, designed to require the maximum use of motor-vehicle capacity, and the conservation of fuel and tires, while not authorizing transportation by persons lacking appropriate authority, sanctioned many practices that were permissible only because of the emergency. As a result, leasing among authorized carriers became more prevalent and widespread. After the war, [fol. 831] because of the desire of many veterans to engage in business for themselves, the ease with which they could obtain financial aid in buying equipment and the difficulty of entering a regulated industry, leasing practices, particularly the employment of owner-operators, have greatly increased."

After the emergency directives and orders were cancelled, complaints regarding leasing practices continued. The Commission found that in many cases leasing of vehicles resulted in unlawful extensions of the carriers' operating authority. Where authorized carriers leased the equipment of non-certificated carriers, many violations of the Act occurred with respect to the inspection and safety rules for drivers and equipment. The Commission found that in the case of short term leases, and more particularly the so-called "trip lease," the arrangements between the authorized carrier and the owner-operator were so informal as to make it impossible to fix responsibility to the shipper or the public. Such arrangements were frequently oral, and even made over the telephone, without inspection of the vehicle or any attempt to ascertain whether the driver was in fact qualified to operate it. They were sometimes completed after the transportation had already taken place. In the case of the single-haul trip lease, the carrier was under no obligation to the owner-operator after completion of the one-way haul, and assumed no responsibility for the return trip. Since some of the owner-operators did not carry public liability or property damage insurance or were unable to obtain it, protection for the public might be entirely lacking. And in such instances, the opportunity was presented for the owner-operator to engage in unlawful transportation. The Commission found that it was a not

[fol. 832] uncommon practice for haulers of exempt commodities (farm and other food products) to obtain traffic through direct solicitation of a shipper and then to contact some authorized carrier having appropriate authority who would pay the highest compensation, and validate the transaction through a trip lease; although such arrangements were clearly illegal, it was very difficult for the Bureau charged with supervision of the traffic to obtain evidence of them. The Commission also found that falsification of drivers' logs in order to cover up violations of safety regulations frequently occurred.

In addition to the serious dangers resulting to or likely to result to the public from the general disregard of safety and inspection rules, the Commission also pointed to unhealthy economic conditions in the industry resulting from the leasing system. It found that owner-operators in certain industrial centers were interested only in truckload traffic and had been responsible for numerous reduced rates tending to cause a deterioration in the rate structure in the territory. And the method of payment used by many authorized carriers to compensate owner-operators for use of their vehicles on a percentage of the gross revenue derived from the transportation performed led the carriers which utilized owner-operator equipment to concentrate upon the profitable traffic to the exclusion of other traffic. This fact, plus the fact of avoidance of normal operating expenses such as maintenance, fuel and others had the effect of distorting the operating statistics of carriers which depended to a large extent upon equipment leased on that basis.

The Commission further found, with respect to leasing [fol. 833] and interchange practices, that a number of carriers conducted their operations wholly or in part in leased equipment and, with minor exceptions, contended that trip leasing was an economic necessity. Certain of the vehicles operated by the authorized carriers under short term or trip leases were vehicles which transported exempt agricultural commodities to market and were used by the carriers on the return trip to transport nonagricultural commodities from distribution centers to the agricultural

sections of the nation. For example, the Commission made the following statement as to the Florida traffic:

> "The record indicates that the interstate common carriers serving Florida generally do not transport perishable fruits and vegetables northbound, apparently because of the lack of adequate equipment and operating authorities that are restricted either as to routes or territory. Almost 100% of this traffic is transported in vehicles of dealers or carriers that specialize in transporting such commodities exclusively and have refrigerated or semirefrigerated equipment. The Florida agricultural industry is said to be dependent on the service, and we are urged by the Florida Railroad and Public Utilities Commission, and the Florida Citrus Commission, as well as other bodies representing Florida growers and shippers of perishable products, to adopt no regulations that would preclude the use of the equipment of the exempt carriers for the south-bound transportation of general commodities under lease. * * * The common carriers domiciled in the North, which have rights to serve Florida, either directly or through interchange, lack equipment to transport the perishable commodities on return trips, and apparently are willing to have a good share of the south-bound traffic transported under lease by the exempt carriers in order to avoid empty return movements from the South. Clearly, this is not a healthy condition from the standpoint of regulation. The transportation of general commodities should be performed by authorized carriers."

The Commission further found that certain railroads having authority to perform motor-truck operations along their rail lines in the transportation of railroad freight between rail stations perform such services in vehicles [fol. 834] leased from others who also furnish the drivers, under long-term contracts or continuing agreements. With respect to this the Commission stated:

> "In general, the terms of the contracts between the railroads and their lessors are as follows: The lessor is required to furnish competent and qualified drivers

of the leased vehicles, which are the employees of the lessor and not the employees of the railroad. The railroad may request removal or discharge of an objectionable driver. Representatives of the railroad prescribe the schedules, routes, records, and methods of handling freight, and only railroad employees deal with the public. The vehicles furnished must meet railroad specifications, and be maintained in good working order, and the lessor is required to provide public-liability and property-damage insurance coverage. The name of the railroad is painted on the vehicles, which must conform to our safety regulations, and to State and Federal laws, and must be operated solely for the purpose of transporting railroad freight, or that which the railroad directs to be transported. The lessor is required to file accident and hours-of-service reports and to comply with safety regulations."

For the foregoing reasons, the Commission found that no necessity existed for applying the rules and regulations in the case of coordinated rail-motor and express service and accordingly exempted vehicles used in such service from the operation of the rules.

With respect to interchange of equipment, the Commission found that while it does not present as serious a problem as that of leasing, many parties to the proceeding advocated the prescription of reasonable rules and regulations governing interchange practices in order to stop those detrimental to the industry.

In summary, the Commission found that many practices indulged in by authorized carriers in leasing equipment had facilitated violations and evasions of law and of the Commission's regulations then in effect and militated [fol. 835] against sound regulation of motor carriers, and that enforcement of existing regulations would not render unnecessary the prescription of rules and regulations governing leasing and interchange of equipment; that there were many arrangements which were on the border line between unlawful practices and those that had been permitted for lack of any definition of legal leasing although not always approved; that under existing conditions it was

the case, so it is clear there were evils there, and clearly the Commission could act and they have acted, and they in turn have said, "These we believe will correct that situation."

From the economic aspects, it is clear the Commission had the authority to take into account that these transitory operations of trip leased operators were causing considerable disturbance. It is impossible to police them and impossible for a carrier to rely upon vehicles; it is impossible for a carrier to rely upon traffic that they may get, if you have these nomads who are here today and gone tomorrow.

[fol. 396] Now, there isn't any question but that carrier after carrier was confronted with this situation. For a time, the owner operators leased equipment or purported to lease it to the shipper. The shipment was brought into, let's say the home office of the carrier. The shipment was taken from that carrier. That carrier, in turn, was almost compelled by economic circumstances to use that owner operator in the opposite direction; compelled almost to feed the very facilities that were aiding and destroying him.

The Department of Agriculture, however interested they may be in the solution of the problem from the standpoint of the farmers, I think are in a very self-contradictory position. After all, regulation itself is for the avoidance of discrimination, preference, advantage and abuse and was the very basis of the inauguration of the Interstate Commerce Act in 1887, and yet we have the spectacle of the Department of Agriculture coming in and saying there should be a vast group of fluid operators over whom there is no rate control and little or no safety inspection, [fol. 397] but who in turn can certainly play their bargaining power shipper against shipper, and that same carrier, in order to economically handle business should have the privilege of imposing upon the certificated carrier in the opposite direction. It doesn't make sense.

Now, I think myself the legal principles are so clear, and I know that this Court has been over them before, and in consequence, while I do have some citations delineating this as a police power question, if the Commission wants

to approach it that way, they have acted within the scope of the language of the Act and I shall not go into any more detail.

I want to say I appreciate the time you have given me. Thank you.

It has been suggested that I point out to your Honors that I represent substantially 75 carriers. Those carriers, as I say, are certificated. They operate through many of the central states. They are not confined to just the suburban operation. They operate into many points in Wisconsin, Minnesota, Iowa, Illinois, Indiana and Michi-
[fol. 398] gan, and they are just as concerned with what is happening to them as are the plaintiffs, but they are willing to abide and give this thing a trial and they have confidence that the Commission will listen to them if these rules prove to be so burdensome that operations become uneconomical or completely inflexible.

Judge Kerner: That ends the arguments for the defendant and the intervenors.

Now, Mr. Ellis.

Rebuttal for the Plaintiffs

Mr. Ellis (For the Plaintiffs): May it please the Court, while I tried to hurry along this morning, and, therefore, I think I have considerable time, I am not going to trespass upon your courtesy very long.

There are one or two things that have come up that I would like to call to your attention. Mr. Reidy, speaking for the Defendant, Interstate Commerce Commission, I think admitted that the complaint of the Secretary of Agriculture, and his position, is completely in accord with protecting the interest of the people of the United States, and in accordance with the law.

[fol. 399] He was asked from the Bench in connection with the example of the citrus fruit haulers going from Florida and other places to New York, should he run back empty. What was his answer? He hasn't any business up there in the first place. Your Honors remember that, but he was up there, gentlemen of the Court, under an exemption granted by the Congress of the United States, in which the Secretary of Agriculture's attorney so well

pointed out, that this Commission is grasping for power where they don't have it, and they want to take and annul the exemptions in this Act.

Another thing that he said was that in connection with trip leased operators, there was no insurance, and I don't want to get into a discussion of that except to say this. There has been so much said about this that I anticipated it on pages 14 and 15 of my brief, I give the uncontroverted testimony of how this is done, how the safety rules are complied with, how the insurance is complied with and how every provision is complied with in trip leasing by [fol. 400] operators such as these plaintiffs, and it was the testimony of the president of one of these plaintiffs, and I hope that the Court will read it, and understand that this survey that Mr. Blanning made under this letter where he, and he is the first man who introduced this name calling in the case, and beat the bushes to try to get some information to substantiate a preconceived and planned position and planned confiscation of our property.

There is a great deal that might be said as to what the distinguished representatives of the Commission argued, but I think it is covered in my brief.

I want to turn my attention to what the counsel for the railroads did not say. His complete silence on the discrimination which exists in their favor is more eloquent than anything I can say. There is no defense for it, your Honors, and they couldn't advance one single argument in their own behalf, and, furthermore, he said that the rules were harsh "but that doesn't invalidate them". If they [fol. 401] are harsh, it is all right to put them into effect on us. If they are so good why did you and your company counsel labor and labor successfully to get yourself exempted from these rules? If they are so fine for the motor carrier industry?

That is all I care to say on the subject of the railroads' participation in this case. We have discussed it elsewhere in our brief.

I am always glad to be in a case with our distinguished ex-Senator Wheeler, but I wasn't sure at times whether he was arguing on our side of this case or the side of the case that he purports to be on. I care not because I think

I know what the law is as laid down by the Supreme Court of the United States, what a lot of people said back in 1935 before him, when he was a member of the Senate, but what I do care about, and what I care this Court is concerned with is what the Congress of the United States did after that, and that is the law. That is now Part II of the Interstate Commerce Act, and there is not one word in it [fol. 402] from beginning to end giving them any power over leasing or even mentioning it.

I was interested in Mr. Wheeler's discussion of what went on down there, but in this case I do not prefer to rely upon his memory since it seems to be the practice here to delve into the Congressional Record. We, in our brief, have pointed out with appropriate citations as to the pages there of what Senator Wheeler said then compared with what ex-Senator Wheeler, representing the Teamsters and Chauffeurs Union, says now. We rely upon the Congressional Record if we are going to delve into the case.

In that Helvering Case, which is the law, you have no right because, the Supreme Court said this, no rights to looking into committee reports when the language is so clear and plain that anybody who can read the English language can understand, and this language is so plain on that subject.

Now, the Senator referred to the National Transportation Policy, and I concur in that. That is what we rely on. [fol. 403] There isn't anything about leasing in there but there is something he didn't mention. There is something that the Defendant, the Interstate Commerce Commission, didn't mention in the Order complained of and that is the National Defense which I assert in our position is the paramount issue before this Court in this case today.

Senator Wheeler was asked by Judge Steckler, "Well, if it was a good thing during World War II, why isn't it a good thing now?" Mr. Wheeler didn't answer that question. He said that it was a good thing during World War II because there was a shortage of material and equipment and they had to use it to get the goods to the ports to get to the boys. Yes, the trucking industry and these men helped to do that under the orders of the Office of Defense Transportation, and I prefer, members of this Court, since Senator Wheeler failed to answer the second part of the

question, to let President Truman answer it for me. He declared there is a National Emergency now, and his proclamation is quoted in full in the last pages of our brief, [fol. 404] and we all know that while in 1941, when the cowardly attack was made at Pearl Harbor, we were threatened by dictators in two hemispheres, today the people of the United States are threatened by Communism all over the world, and President Truman has said, "Regardless of what happens in Korea, we must go ahead and arm ourselves and make America Strong enough to protect our liberties.

I am not waving the Flag; I am talking about what the law is. The law says that the National Defense is the paramount issue in the transportation policy. We say that this Order which, instead of providing for the maximum use of equipment such as the orders of the Defense Transportation which we have in our brief did during World War II, that this Order provides for the least utilization of equipment at this hour of national peril and national need.

As it has been well pointed out by Mr. Cockrum in his brief, they are allocating all of these valuable metals, iron and steel, etc., down at Washington, and the trucking manufacturers can only get a little bit. We will need [fol. 405] every truck that possibly can be used if we are to prevail in the present situation, and I say, since counsel on the other side has, as I view it, evaded answering that question, I prefer to let President Truman answer it for me.

I could take a great deal of time referring to a lot of things that have been said here, but I believe they are covered in our brief. We appreciate this opportunity to be heard by the members of this Court. You have been patient and courteous to us, and I would like now to conclude my argument.

I do, however, want to call to the attention of the Court that we desire to be heard in connection with the request for an interlocutory injunction in this matter at this time unless——

Judge Kerner (Interposing): I was hoping we might arrange something between all of us and have the Commis-

sion agree while the case is under advisement so that that would not be necessary.

We are thankful to you gentlemen, all three of us for the splendid arguments and briefs. We want to do the best we [fol. 406] can and we can't do that overnight. With all these briefs we will need some time.

Mr. Ellis (For the Plaintiffs): I was going to suggest, we do not want to press and take the time of the Court at this time, but we think we are entitled to have this held up.

Mr. Reidy (For the Defendant): Would you care to indicate how long an extension you would like, sixty days?

Judge Kerner: I would say we would need at least sixty days. I know the condition of Judge Steckler's calendar and I want to keep up with my own work in Chicago, and I am sure Judge Platt is just as busy, so we will need at least sixty days.

Mr. Reidy (For the Defendant): If you find you need more time let us know and we will arrange for it.

Mr. Ellis (For the Plaintiffs): Certainly. There is one other matter.

Judge Kerner (Interposing): We will make that sixty days.

Mr. Ellis (For the Plaintiffs): There is one other matter [fol. 407] I would like to call to the attention of the Court. I have no objection whatever to Mr. Wheeler filing here the same brief that he filed in another proceeding, but I do not want later to have it argued that this is the same case as down there as the basis of that brief being filed here. I want the record to show we don't care about it as long as that interpretation is placed upon it.

Judge Kerner: I understood it that way.

The Court will stand adjourned and the case will be taken under advisement.

(Whereupon, at 3:15 o'clock, p. m., the hearing in the above-entitled matter was adjourned.)

[fols. 408-827] Clerk's and Reporter's Certificates to foregoing transcript omitted in printing.

[fol. 828] IN UNITED STATES DISTRICT COURT

Civil Action No. 2825

EASTERN MOTOR EXPRESS, INC., A. C. E. TRANSPORTATION Company, Inc., The Akron-Chicago Transportation Company, Incorporated, All States Freight, Inc., Chicago Express, Inc., Continental Transportation Lines, Inc., Cooper-Jarrett, Inc., Dixie Ohio Express Co., Interstate Motor Freight System, Kelleher Motor Freight Lines, Inc., Kramer Bros. Freight Lines, Inc., Liberty Motor Freight Lines, Incorporated, Long Transportation Co., Mid-States Freight Lines, Inc., Midwest Freight Forwarding Co., Motor Cargo, Inc., Roadway Express, Inc., Spector Motor Service, Inc., Summit Fast Freight, Inc., Transamerican Freight Lines, Inc., Yankee Lines, Inc., et al, Plaintiffs,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants, et al

OPINION—February 11, 1952

Before, Kerner, Circuit Judge, and Platt and Steckler, District Judges.

Kerner, Circuit Judge. Twenty-one motor common carriers operating under the authority of the Interstate Commerce Commission (49 U.S.C.A. Chap. 8) brought suit to enjoin enforcement of an order of the Commission prescribing [fol. 829] a new set of rules intended to regulate practices of motor common and contract carriers related to leasing and interchange of vehicles. A special court of three judges was convened pursuant to statute, 28 U.S.C.A. §§2284(1) and 2325, to hear and determine the application. The United States Secretary of Agriculture, the Public Counselor of Indiana, and the National Industrial Traffic League were granted leave to intervene in support of the complaint, and the Teamsters' Union, substantially all of the Class I railroads of the United States, and a number of certificated carriers serving points in the Chicago surburban area and in six states of the North Central area, in opposition. The matter was heard on the pleadings and record made before

the Commission and the briefs and argument of counsel. Motion of plaintiffs for leave to adduce additional evidence pertaining to the value of their property and rights and the effect of the order thereon was denied. *New York* v. *United States*, 331 U.S. 284, 335.

The proceeding which culminated in the promulgation of the rules now challenged by plaintiffs was instituted on January 9, 1948. At that time the Commission issued the requisite notice of proposed rule making stating that an investigation would be made pursuant to the Interstate Commerce Act into the lawfulness of certain practices of authorized carriers with respect to their use of nonowned equipment in the performance of transportation. There was attached to the notice a tentative set of rules representing a composite of the views and recommendations of various parties interested in the situation. Extensive hearings were held before an examiner. These hearings were participated in by numerous associations of common and [fol. 830] contract carriers, individual carriers and shippers, owners and operators of vehicles under lease to carriers, the Teamsters' Union, the Railway Express Agency, the railroads, the Bureau of Motor Carriers, the regulatory bodies of nine states, and others. The examiner filed his report recommending the adoption of certain rules governing leasing and interchange of vehicles; exceptions were filed; and Division 5 of the Commission, charged with the handling of motor vehicle cases, issued its report. 51 M.C.C. 461. Upon petitions for reconsideration, the proceeding was reopened and argument had before the entire Commission which thereafter issued its report and entered the order here complained of. 52 M.C.C. 675.

In its report the Commission stated that the proceeding had arisen because of a practice which antedated the Motor Carrier Act of 1935 and undoubtedly was more prevalent in the motor-carrier industry than in any other field of transportation, i.e., the use of nonowned vehicles in their operations by those holding authority as carriers. To a great extent the ownership in such cases was vested in individuals generally known as owner-operators who either drove their vehicles themselves or hired others to drive them. The Commission had initiated a study of conditions

obviously impossible for its enforcement staff to advise carriers respecting leasing arrangements which were lawful and those which were unlawful, and that the carriers themselves had no guide as to the practices which were legal.

The Commission rendered the following ultimate findings:

> "We find, upon consideration of all the evidence of record, that evasions and violations of the provisions of part II of the act, and of our regulations prescribed thereunder, occur in the present practices of motor common and contract carriers of property that are subject to such provisions in augmenting their motor-vehicle equipment other than by purchase, and in interchanging equipment; that it is necessary in order properly to administer, execute, and enforce such provisions and the regulations thereunder, that reasonable rules and regulations be prescribed governing the lease and interchange of such equipment by such carriers; and that the rules and regulations set forth in appendix E hereto are, and for the future will be, reasonable, and should be prescribed for observance by such carriers. The findings in the prior report of division 5 are modified accordingly. An appropriate order prescribing for the future the reasonable rules and regulations set forth in appendix E to the report will be entered."

The effective date of the order has been postponed from time to time by the Commission pending determination of suits here and in other jurisdictions to set it aside. One such suit was decided by a three-judge court for the Northern District of Alabama on December 14, 1951, denying the application there filed by a number of truckers' associations and motor common carrier corporations for relief similar to that sought by the 21 plaintiffs before this court. [fol. 836] *American Trucking Association, Inc., et al.* v. *United States and Interstate Commerce Commission,* ——— F. S. ———. We shall refer to this as the Alabama case. The principal issue there related to the statutory authority of the Commission to make the order complained

of. In a very carefully considered opinion the court decided that the Commission was empowered by the provisions of the Interstate Commerce Act to regulate by reasonable rules the manner in which motor carriers procure or provide by lease or interchange the equipment used by them in performing their essential transportation services. The court further held that the procedure followed by the Commission in its hearings culminating in the promulgation of the rules completely satisfied the requirements of the Administrative Procedure Act, with particular reference to notice and hearing, and that the rules prescribed were not arbitrary, capricious or an abuse of discretion. Our study of the case presented to us has been made considerably easier by the excellent analysis of the historical background and legislative scheme of the Motor Carrier Act under the authority of which the present order was issued. We consider it unnecessary to repeat that discussion except to say that under the scheme of the Act the Commission is vested with full authority to regulate so-called common and contract carriers but that a large number of other carriers remained outside the orbit of its control, and "whether the trucking operation is within or without the orbit of economic regulation, the vehicles used are not substantially different."

There appears to have been general agreement among all participants at all stages of the current proceedings as to the necessity for some tightening up of either the regulations governing the use of non-owned equipment or the en- [fol. 837] forcement of the existing regulations. Many of the motor carriers themselves had been very active in their demands for improvements of then existing conditions which they recognized as detrimental both to the public and to the industry. So it appears to us that the fundamental controversy between the Commission and the complaining carriers revolves about the question of the degree of regulation needed to eliminate the undesirable conditions and practices. As we understand plaintiff's position, it is that the rules finally promulgated are so drastic as to constitute an unlawful usurpation of authority on the part of the Commission and an impairment of their constitu-

tional guarantees of freedom of contract and property rights. Other objections to the rules will be noted hereafter.

The rules which plaintiffs find most objectionable are contained in the following sections:

> S207.4 " * * * authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions: (a) The contract * * * for the use of such equipment——
>
> * * * * * *
>
> (3) Shall specify the period for which it applies which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employees of the owner * * *
>
> * * * * * *
>
> (5) Shall specify the compensation to be paid by the lessee for the rental of the leased equipment; provided, however, that such compensation shall not be computed on the basis of any division or percentage of any applicable rate or rates on any commodity * * * transported in said vehicle or on a division or percentage of any revenue earned by said vehicle during the period for which the lease is effective;"

They also complain to a lesser degree of the hampering restrictions on interchange of equipment between authorized carriers by S207.5 which they say prohibits leasing except where both parties to the lease are authorized to serve both points between which they operate and also limits leasing to carriers of the same type, so that a regular route [fol. 838] common carrier could not lease equipment to an irregular route common carrier, nor a contract carrier to a common carrier of any type; and of the exemption by S207.3(b) of all equipment utilized wholly or in part in the transportation of railway express traffic, or in substituted motor-for-rail transportation of railroad freight moving between points that are railroad stations on railroad billing.

Plaintiffs contend that the objectionable provisions of the order are in direct conflict with S208(a) of the Interstate Commerce Act, 49 U.S.C.A. S308(a), which prohibits the Commission from imposing conditions restricting the right of the authorized carrier to add to its equipment and facilities within the authorized territories, hence constitute an unlawful usurpation of authority. We think this contention is fully answered by the court in the Alabama case and we reject it for the reasons there stated and on the authority of the cases there referred to.

Plaintiffs further contend that the regulations governing lease and interchange jeopardize the national defense in that they prevent maximum utilization of transportation facilities in this time of extraordinary need. They point to the proclamation by the President of the United States on December 16, 1950, of the existence of a national emergency which, they argue, requires the free, unhampered use of all equipment, impossible under the provisions of the Commission's order. And since the purpose clause of the National Transportation Act specifies the national defense as one of the needs to be met in the development of a national system of transportation, they argue that restrictions which prevent maximum utilization of all facilities are invalid. We cannot agree. Conditions found by the [fol. 839] Commission to exist in the industry clearly showed the necessity for curtailing the practices responsible for them. It was shown that some of the very practices sought to be prevented resulted from the same kind of free and unhampered conditions prevailing during and after the last war. If a serious worsening of conditions develops hereafter it may furnish a reason for suspending the operation of the rules under directives similar to those of the Office of Defense Transportation and the orders of the Commission during the war, referred to in the report of the latter. Such directives and orders would presumably be made under proper safeguards of the Commission, compatible with the public safety. Compare *American Airlines, Inc.*, v. *Civil Aeronautics Board*, 192 F 2d 417. We find no grounds for holding the order promulgating the rules invalid on the basis of the proclamation.

Plaintiffs assert that the order jeopardizes the national

economy in prohibiting the use of vehicles transporting exempt agricultural commodities in one direction for return trips as a part of the motor-vehicle fleet of common carriers. In this they are joined by the Secretary of Agriculture who participated in the hearings before the Commission. His opposition to the order was principally based on the theory that the rules "virtually nullify the agricultural exemptions contained in SS203(b)(4a), (5) and (6) of the Interstate Commerce Act (49 U.S.C.A. 1946 ed. 303(b)(4a), (5) and (6); * * * *." Section 203(b) provides that, except for safety and inspection provisions, vehicles controlled and operated by: (4a) any farmer when used in the transportation of his agricultural commodities or supplies to his farm, (5) an agricultural cooperative association or federation of such, or (6) vehicles used in carrying livestock, fish or agricultural commodities if not used in carrying any [fol. 840] other property or passengers for hire, shall be exempt from the operation of the Act. It appears that what plaintiffs, including the Secretary, are seeking as to this point is to invalidate the entire order with respect to trip leasing because, they assert, vehicles exempted by statute are not excluded from the operation of the rules. And yet the statute itself limits the exemption solely to vehicles *when used* for the carriage of food stuffs or farm supplies or if not used in carrying other property or passengers for hire.

The Secretary argues on the basis of custom and expediency that discontinuance of the trip-leasing practice which had been engaged in for many years would result in restricting the distribution of the products of agriculture, increasing the mileage operated without cargo by both Commission-regulated carriers and the transporters of agricultural commodities and farm supplies, and charging of higher transportation costs to the public in order to compensate both types of carriers for the increased "cargoless" mileage. This may all be true, but it is an argument which must be addressed to the Congress. Perhaps Congress might find the answer in removing the exemption entirely from the long-haul, large-scale fleet operations discussed by the Secretary in his brief in which he refers to the testimony as to comparative numbers,

"According to Commissioner John L. Rogers there were in the United States on February 1, 1950, approximately 40,000 haulers of agricultural commodities, farm supplies, and fish operating in interstate commerce (owning 150,000 exempt trucks) as compared to 20,042 Commission-regulated carriers of property." Far from justifying the continuation of the system as developed, we are of the opinion that this evidence further points up the necessity for the stricter regulation which will result from the operation [fol. 841] of the new rules, in view of the record in this case and the findings by the Commission of the serious evils which have resulted from the unregulated trip-leasing practices of the past, including those of the exempt commodity carriers. It is clear from the record that the Commission gave the matter very careful consideration before concluding that trip leasing of vehicles operated by private or exempt carriers was not consistent with regulation and should be prohibited. We cannot agree that the order nullifies the agricultural exemption.

Plaintiffs further contend that the order is invalid for failure of the Commission to follow the provisions of the Administrative Procedure Act, with particular reference to the burden of proof on the proponent of a rule or order. 5 U.S.C.A. S1006(c). The tentative rules attached to the original notice of proposed rule making were, as previously stated, a composite of rules proposed by various interested groups and parties and were, in some cases, in conflict. Full hearing on conditions, general and particular, demonstrated the necessity for further regulation to curb the undesirable or even illegal practices disclosed and indicated the particular rules best calculated to remedy conditions from among all those proposed or recommended by the various parties. Thereafter the task of the Commission was one of revision and promulgation, based on its own findings as supported by the evidence. We think the record discloses ample compliance with all requirements of the Administrative Procedure Act including that of the burden of proof.

The last issue which plaintiffs assert was not presented to or decided by the court in the Alabama case is whether the order impairs constitutional guarantees of contract

[fol. 842] and property rights. As to this we deem it necessary to refer only to the classic statement in *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 228:

> "The power to regulate interstate commerce is as stated by Chief Justice Marshall, full and complete in Congress, and there is no limitation in the grant of the power which excludes private contracts of the nature in question from the jurisdiction of that body. Nor is any such limitation contained in that other clause of the Constitution which provides that no person shall be deprived of property without due process of law. * * * the power of Congress to regulate interstate commerce comprises the right to enact a law prohibiting the citizen from entering into those private contracts which directly and substantially * * * regulate to a greater or less degree commerce among the States."

Plaintiffs argue that this case is not applicable here for the reason that the contracts inhibited by the order of the Commission are in fact in the furtherance of the free flow of interstate commerce instead of in restraint thereof. We cannot agree. It is for the Commission, under its broad regulatory power, to determine what properly furthers the free flow of commerce and what unduly restrains it. The Commission has spoken and, we repeat, its findings are amply supported by the record. It is not for us to say that its order, based thereon, is invalid. *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225.

In conclusion we find that:

1. The Commission had jurisdiction to promulgate rules regulating leasing and interchange of equipment by carriers operating under its authority; 2. The Commission complied with the requirements of the Administrative Procedure Act in promulgating its order; 3. The evidence before the Commission amply supports its findings as to the necessity for further regulation with respect to the practices under investigation; 4. The rules were not arbitrary, capricious or discriminatory, and did not improperly interfere with plaintiffs' contract and property [fol. 843]

rights; and 5. The order was not based on mistake of law or misapplication of proper statutory standards.

It follows that plaintiffs are not entitled to the injunction sought by their bill of complaint and the suit must be, and it is hereby dismissed.

Otto Kerner, United States Circuit Judge, Casper Platt, United States District Judge, William E. Steckler, United States District Judge.

[fol. 844] IN UNITED STATES DISTRICT COURT

EASTERN MOTOR EXPRESS, INC., et al, Plaintiffs,

v.

UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, et al, Defendants

No. 2825 Civil

JUDGMENT—February 11th, 1952

This cause came on to be heard on the 19th day of November, 1951, before a duly constituted district court of three judges, wherein this cause was submitted for final judgment upon plaintiffs' complaint praying this Court to adjudge the order of the Interstate Commerce Commission, entered May 8, 1951, in proceedings entitled "Lease and Interchange of Vehicles by Motor Carriers, Ex Parte No. MC-43," to be null and void and to set aside, suspend and annul the same and its enforcement, and also to perpetually restrain and enjoin the United States of America, and the Interstate Commerce Commission, their law enforcement officers, agents, servants and employees, from taking any steps or instituting or further presenting any proceedings to enforce said order against plaintiffs. The matter was heard on the pleadings and record made before the Interstate Commerce Commission and the briefs and argument of counsel. Motion of plaintiffs for leave to present additional evidence pertaining to the value of their property and rights and the effect of the order thereon was denied.

[fol. 845] In conformity with the opinion of the Court contemporaneously filed herewith:

It is, accordingly, Ordered, Adjudged, and Decreed by the Court that plaintiffs are not entitled to any relief for which they have prayed and that this action be and the same is hereby dimissed with prejudice.

It is further Ordered, Adjudged, and Decreed that the costs of court incurred herein be and the same are hereby taxed against plaintiffs.

Otto Kerner, United States Circuit Judge, Casper Platt, United States District Judge, William E. Steckler, United States District Judge.

[fol. 846] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title Omitted]

PETITION FOR APPEAL—Filed March 4, 1952

Come now Eastern Motor Express, Inc., a corporation organized and existing under the laws of the State of Indiana, with its principal corporate office and principal place of business at 128 Cherry Street, Terre Haute, Indiana; A.C.E. Transportation Company, Inc., a corporation organized and existing under the laws of the State of Ohio, with its principal corporate office and principal place of business at 395 Baird Street, Akron, Ohio; The Akron-Chicago Transportation Company, Incorporated, a corpora-
[fol. 847] tion organized and existing under the laws of the State of Ohio, with its principal corporate office and principal place of business at 347 West Thornton Street, Akron, Ohio; All States Freight Inc., a corporation organized and existing under the laws of the State of Ohio, with its principal corporate office and principal place of business at Akron, Ohio; Chicago Express, Inc., a corporation organized and existing under the laws of the State of New York, with its principal corporate office and principal place of business at 507 West Street, New York City; Continental Transportation Lines, Inc., a corporation organized

and existing under the laws of the State of Pennsylvania, with its principal corporate office and principal place of business at 1813 North Franklin Street, Pittsburgh, Pennsylvania; Cooper-Jarrett, Inc., a corporation organized and existing under the laws of the State of Missouri, with its principal place of business at 2113 West 73rd Street, Chicago, Illinois; Dixie Ohio Express Co., a corporation organized and existing under the laws of the State of Ohio, with its principal corporate office and principal place of business at 237 Fountain Street, Akron, Ohio; Interstate Motor Freight System, a corporation organized and existing under the laws of the State of Michigan, with its principal corporate office and principal place of business at 134 Grandville Avenue, S. W., Grand Rapids, Michigan; Kelleher Motor Freight Lines, Inc., a corporation organized and existing under the laws of the State of Missouri, with its principal corporate office and principal place of business at 3130 Hall Street, St. Louis, Missouri; Kramer Bros. Freight Lines, Inc., a corporation organized and existing under the laws of the State of Michigan with its principal corporate office and principal place of business at [fol. 848] 4195 Central Avenue, Detroit, Michigan; Liberty Motor Freight Lines, Incorporated, a corporation organized and existing under the laws of the State of New York, with its principal corporate office at 120 Broadway, New York, New York; Long Transportation Company, a corporation organized and existing under the laws of the State of Michigan, with its principal corporate office and place of business located at Detroit, Michigan; Mid-States Freight Lines, Inc., a corporation organized and existing under the laws of the State of Kansas, with its principal corporate office at Topeka, Kansas, and principal place of business at Chicago, Illinois; Midwest Freight Forwarding Co., a partnership composed of Sol De Ceanne and Domenice De Ceanne, with its principal place of business at 3220 South Wolcott Avenue, Chicago, Illinois; Motor Cargo, Inc., a corporation organized and existing under the laws of the State of Ohio with its principal corporate office, and principal place of business at 700 Carroll Street, Akron, Ohio; Roadway Express, Inc., a corporation organized and existing under the laws of the State of Ohio,

with its principal corporate office and principal place of business located at 145 Park Street, Akron, Ohio; Spector Motor Service, Inc., a corporation organized and existing under the laws of the State of Missouri, with its principal corporate office at 905 South 9th Street, St. Louis, Missouri; Summit Fast Freight, Inc., a corporation organized and existing under the laws of the State of Ohio, with its principal corporate office and place of business at 1142 Newton Street, Akron, Ohio; Transamerican Freight Lines, Inc., a corporation organized and existing under the laws of the State of Delaware, with its principal corporate office at 100 West 10th Street, Wilmington, Delaware, and its principal place of business at 1700 North Waterman Avenue, Detroit, Michigan; Yankee Lines, Inc., a corporation organized and [fol. 849] existing under the laws of the State of Ohio, with its principal corporate office and principal place of business at Akron, Ohio, and The National Industrial Traffic League, a party-plaintiff by intervention, pursuant to order of the court, a voluntary association with principal office in the District of Columbia, composed of persons, firms, corporations and associations engaged or interested in the transportation of property in interstate commerce by all forms of transportation agencies subject to the provision of the Interstate Commerce Act and the jurisdiction of the Interstate Commerce Commission, including motor carriers, and a party to the proceedings before the Interstate Commerce Commission in Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, and pursuant to Rule 72 of the Rules of Civil Procedure and pursuant to Rules 9, 12, 36 and 46 of the Supreme Court of the United States, and other rules of the Supreme Court of the United States applicable hereto, present this, their petition for appeal, accompanied by an assignment of errors and a statement as to jurisdiction, which petition seeks an appeal to the Supreme Court of the United States from the judgment of this court heretofore entered in this cause on February 11, 1952, and in support of said petition allege and say:

I

That Eastern Motor Express, Inc., A.C.E. Transportation Company, Inc., The Akron-Chicago Transportation

Company, Incorporated, All States Freight, Inc., Chicago Express, Inc., Continental Transportation Lines, Inc., Cooper-Jarrett, Inc., Dixie Ohio Express, Co., Interstate Motor Freight System, Kelleher Motor Freight Lines, Inc., Kramer Bros. Freight Lines, Inc., Liberty Motor Freight Lines, Incorporated, Long Transportation Co., Mid-States Freight Lines, Inc., Midwest Freight Forwarding Co., Motor Cargo, Inc., Roadway Express, Inc., Spector Motor Services, Inc., Summit Fast Freight, Inc., Transamerican [fol. 850] Freight Lines, Inc., Yankee Lines, Inc., are common carriers of property by motor vehicle, operating under certificates of public convenience and necessity heretofore issued to them by the Interstate Commerce Commission, pursuant to applicable provisions of Part II of the Interstate Commerce Act, and that The National Industrial Traffic League is a voluntary association of shippers and receivers of freight, with principal offices in the District of Columbia.

II

On January 9, 1948, the Interstate Commerce Commission entered an order in Docket Ex Parte No. MC-43, issuing a notice of proposed rule making, involving lease and interchange of vehicles by motor carriers. Said order named these plaintiffs and petitioners, and all other motor carriers in the United States operating under authority issued by the Interstate Commerce Commission as respondents.

That after public hearings and other proceedings, the Interstate Commerce Commission, on May 8, 1951, issued an order in Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers, containing certain rules and regulations vitally affecting the business and operations of these plaintiffs and other motor carriers operating in the United States.

That on August 1, 1951, the Interstate Commerce Commission made an order denying the petitions for reconsideration of the order of May 8, 1951 filed by these plaintiffs and others, which exhausted the remedies of these plaintiffs before the Interstate Commerce Commission. The original effective date of said order was August 1,

1951, which has been postponed from time to time, and said order is now to become effective April 1, 1952.

That on August 16, 1951, plaintiffs filed their complaint and petition for injunction in this court. Thereafter, by order of the court, certain parties were permitted to in- [fol. 85] tervene as parties-plaintiff, or parties-defendant, including The National Industrial League, the Secretary of Agriculture of the United States; and the Public Counselor of Indiana, who were granted leave to intervene in support of the complaint, the Teamsters Union, most of the Class I Railroads of the United States, and a number of motor carriers serving points in the Chicago Suburban Area, who were granted leave to intervene in opposition.

In the resume of the case just completed, reference has been made only to certain essential matters, and no reference whatever has been made to many matters, which occurred during the proceedings had before the Interstate Commerce Commission.

III

On November 19, 1951, hearing on the merits and argument was had before a statutory three-judge court composed of the Honorable Otto Kerner, Circuit Judge, and the Honorable Casper Platt and the Honorable William E. Steckler, District Judges.

Briefs were filed by certain of the parties, and thereafter, the case submitted to this court.

On February 11, 1952, the court filed its written opinion and entered a judgment that this cause be dismissed with prejudice, which opinion is attached hereto, marked Exhibit "A" and made a part hereof by reference, and the entry and judgment of February 11, 1952 is attached hereto, marked Exhibit "B", and made a part hereof by reference. The decision and opinion of the court was by Judge Kerner and concurred in by Judge Platt and Judge Steckler.

IV

Attached hereto and accompanying this petition is an Assignment of Errors in accordance with Rule 9 and other applicable rules of the Supreme Court of the United States.

[fol. 852]

V

Attached hereto and accompanying this petition is a statement as to jurisdiction in accordance with Rule 12 and other applicable rules of the Supreme Court of the United States.

VI

Plaintiffs now offer to give proper security for costs and good and sufficient security for a supercedeas and stay of execution or other proceedings under the judgment or decree pending such appeal, conditioned with good and sufficient security that the plaintiffs shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, all as provided in Rule 36 and other applicable rules of the Supreme Court of the United States, said security to be in the amount or amounts fixed by this court.

Wherefore, your petitioners, Eastern Motor Express, Inc., A.C.E. Transportation Company, Inc., The Akron-Chicago Transportation Company, Incorporated, All States Freight, Inc., Chicago Express, Inc., Continental Transportation Lines, Inc., Cooper-Jarrett, Inc., Dixie Ohio Express Co., Interstate Motor Freight System, Kelleher Motor Freight Lines, Inc., Kramer Bros. Freight Lines, Inc., Liberty Motor Freight Lines, Incorporated, Long Transportation Co., Mid-States Freight Lines, Inc., Midwest Freight Forwarding Co., Motor Cargo, Inc., Roadway Express, Inc., Spector Motor Service, Inc., Summit Fast Freight, Inc., Transamerican Freight Lines, Inc., Yankee Lines, Inc., plaintiffs, and The National Industrial Traffic League, party-plaintiff, in the above-entitled cause, respectfully pray that this court, or a judge thereof, allow this appeal, sign the requisite citation, and fix the amount of requisite security therefor, and grant to your petitioners [fol. 853] all other and further relief necessary and proper in the premises.

Eastern Motor Express, Inc., By David G. Bartram, Secretary, Howell Ellis.

Howell Ellis, 520 Illinois Building, Indianapolis, Indiana.
Milton E. Diehl, 1003 Munsey Building, Washington, D. C.

Attorneys for Plaintiffs.
Of Counsel:
John S. Burchmore, Walter, Burchmore & Belnap, 2106 Field Building, Chicago, Illinois.

[fols. 854-873] *Duly sworn to by David G. Bartram and Howell Ellis. Jurats omitted in printing.*

[fol. 874] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed March 4, 1952

The United States District Court for the Southern District of Indiana, in its opinion and entry of February 11, 1952, dismissing plaintiff's complaint and petition for injunction with prejudice, erred:

[fol. 875] I. In denying plaintiffs the right to adduce additional evidence pertaining to the value of their property and operating rights, and the effect of the order thereon in support of the allegations contained in paragraphs 22 and 39 of plaintiffs' complaint, that the order of the Interstate Commerce Commission dated May 8, 1951 is confiscatory and that said order of said Commission will deprive the plaintiffs and each of them, of their property without due process of law, in violation of the provisions of the Constitution of the United States, and particularly the Fifth Amendment to the Constitution of the United States. (The ruling of the court referred to is at page 38 of the official reporter's transcript of the hearing on the merits before the United States District Court for the Southern District of Indiana on November 19, 1951.)

II. In entering the following judgment in this cause:

"It is, accordingly, Ordered, Adjudged, and Decreed by the Court that plaintiffs are not entitled to any relief for which they have prayed and that this action

be and the same is hereby dismissed with prejudice." (Entry for February 11, 1952)

III. In determining and ruling and in stating in its opinion, as the basis of its judgment herein, the following:

"1. The Commission had jurisdiction to promulgate rules regulating leasing and interchange of equipment by carriers operating under its authority;

"2. The Commission complied with the requirements of the Administrative Procedure Act in promulgating its order;

[fol. 876] "3. The evidence before the Commission amply supports its findings as to the necessity for further regulation with respect to the practices under investigation;

"4. The rules were not arbitrary, capricious or discriminatory, and did not improperly interfere with plaintiffs' contract and property rights; and

"5. The order was not based on mistake of law or misapplication of proper statutory standards."

(Opinion of the court, pages 15-16)

IV. In determining and ruling and stating as the basis of its rejection of plaintiffs' contentions that provisions of the order of the Interstate Commerce Commission of May 8, 1951 are in direct conflict with Section 208(a) of the Interstate Commerce Act, 49 U.S.C.A. S308(a), a judgment of the United States District Court for the Northern District of Alabama, Southern Division, entered December 14, 1951, in American Trucking Associations, Inc., et al, plaintiffs, v. United States of America and Interstate Commerce Commission, defendants, Civil Action No. 6758, a case not before the United States District Court for the Southern District of Indiana, and thereby placing upon these plaintiffs the burden of contesting the validity of a decision made by another court on a different record in a case in which these plaintiffs are not parties. (Opinion of the Court, page 11)

V. In rejecting plaintiffs' contentions that the regulations included in the order complained of jeopardize the

national defense, contrary to the national transportation policy of the National Transportation Act, and violate the national transportation policy of the National Transportation Act, and in disregarding the proclamation of the President of the United States issued December 16, 1950. Opinion of the Court, pages 11-12)

[fols. 877-938] VI. In rejecting plaintiffs' contentions and those of the Secretary of Agriculture that the order of May 8, 1951 of the Interstate Commerce Commission jeopardizes the national economy in prohibiting the use of vehicles transporting exempt commodities in one direction for return trips under lease by certificated common carriers, thereby nullifying the agricultural exemption included in the Act. (Opinion of the Court, pages 12-14)

VII. In rejecting plaintiffs' contentions that the order of May 8, 1951 of the Interstate Commerce Commission is invalid on account of the failure of the Commission to follow the provisions of the Administrative Procedure Act, with particular reference to the burden of proof on the proponent of a rule or order. (5 U.S.C.A. §1006(c)) (Opinion of the Court, page 14)

VIII. In rejecting plaintiffs' contentions that the order of May 8, 1951 of the Interstate Commerce Commission impairs constitutional guarantees in connection with the right of private contract. (Opinion of the Court, pages 14-15)

Wherefore, Eastern Motor Express, Inc., A.C.E. Transportation Company, Inc., The Akron-Chicago Transportation Company, Incorporated, All States Freight, Inc., Chicago Express, Inc., Continental Transportation Lines, Inc., Cooper-Jarrett, Inc., Dixie Ohio Express Co., Interstate Motor Freight System, Kelleher Motor Freight Lines, Inc., Kramer Bros. Freight Lines, Inc., Liberty Motor Freight Lines, Incorporated, Long Transportation Co., Mid-States Freight Lines, Inc., Midwest Freight Forwarding Co., Motor Cargo, Inc., Roadway Express, Inc., Spector Motor Service, Inc., Summit Fast Freight, Inc., Transamerican Freight Lines, Inc., Yankee Lines, Inc., and the National Industrial Traffic League, plaintiffs and appellants, pray that the judgment be reversed.

Howell Ellis, Attorney for Plaintiffs.

[fol. 939] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 4, 1952

Eastern Motor Express, Inc., A.C.E. Transportation Company, Inc., The Akron-Chicago Transportation Company, Incorporated, All States Freight, Inc., Chicago Express, Inc., Continental Transportation Lines, Inc., Cooper-Jarrett, Inc., Dixie Ohio Express Co., Interstate Motor Freight System, Kelleher Motor Freight Lines, Inc., Kramer Bros. Freight Lines, Inc., Liberty Motor Freight Lines, Incorporated, Long Transportation Co., Mid-States [fols. 940-947] Freight Lines, Inc., Midwest Freight Forwarding Co., Motor Cargo, Inc., Roadway Express, Inc., Spector Motor Service, Inc., Summit Fast Freight, Inc., Transamerican Freight Lines, Inc., Yankee Lines, Inc., plaintiffs, and The National Industrial Traffic League, Party-plaintiff by intervention, having made and filed the petition praying an appeal to the Supreme Court of the United States from the final decree of this court in this cause entered February 11, 1952, and having also filed their Assignment of Errors and their statement of jurisdiction, and having in all respects conformed to the statutes and rules of the court in such case made and provided.

It is ordered and decreed that the appeal be and it is hereby allowed as prayed.

——, Judge, United States Circuit Court of Appeals, ——, Judge, United States District Court, William E. Steckler, Judge, United States District Court.

Dated: March 4, 1952

[fols. 948-955] Bond on appeal for $500.00 approved and filed March 4, 1952 omitted in printing.

[fols. 948-955] [Bond on appeal for $500.00 approved and filed March 4, 1952 omitted in printing.]

[fol. 956] [File endorsement omittetd]

IN UNITED STATES DISTRICT COURT

[Title omitted]

INJUNCTION—Filed March 6, 1952

This cause coming on to be heard in open court, and the court having read and considered the verified petition heretofore filed for an injunction during the pendency of an appeal to the Supreme Court of the United States,

[fols. 957-1022] And it appearing to the court that said petitioners have heretofore filed herein their petition for appeal to the Supreme Court of the United States from the final decree of this court herein, and that by order of this court said appeal has been allowed, and the court having heard argument of counsel and being fully advised in the premises,

It is Ordered, Adjudged and Decreed, that the defendants, United States of America and the Interstate Commerce Commission, their agents, servants, employees, attorneys and officers, be, and they are, hereby enjoined and restrained from enforcing or attempting to enforce in any manner the order entered by said Interstate Commerce Commission on May 8, 1951 in Docket Ex Parte No. MC-43, entitled Lease and Interchange of Vehicles by Motor Carriers, against these plaintiffs, and each of them, until the final disposition by the Supreme Court of the United States of the appeal of said petitioners heretofore allowed herein, and until the further order of this court.

Otto Kerner, Judge, United States Circuit Court of Appeals, Casper Platt, Judge, United States District Court, William E. Steckler, Judge, United States District Court.

Dated at Indianapolis, Indiana this 6th day of March, 1952.

[fol. 1023] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed March 27, 1952

The Secretary of Agriculture of the United States, being an intervening plaintiff in this action and considering himself aggrieved by the final order, judgment and decree of this Court entered on February 11, 1952, hereby petitions that an appeal be allowed to the Supreme Court of the United States from said final order, judgment and decree, and from each and every part thereof; that a citation be issued according to law; that an order be made pursuant to 28 U.S.C. Supp. IV § 2408 (the Secretary being an officer supervising and controlling a department of the United States) dispensing with an appeal bond for costs; and that the material parts of the record, proceedings and papers upon which said final order, judgment and decree was based, duly authenticated, be sent to the Supreme Court of the United States in accordance with the rules in such case made and provided.

Respectfully submitted, (s) W. Carroll Hunter, Solicitor, Neil Brooks, Associate Solicitor, Henry A. Cockrum, Richard C. Johnson, Attorneys for the U. S. Department of Agriculture.

Dated: March 24, 1952, Washington, D. C.

[fol. 1024] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 27, 1952

The Secretary of Agriculture of the United States having made and signed his petition for an appeal to the Supreme Court of the United States from the final order, judgment

and decree of this Court entered in this cause February 11, 1952, and from each and every part thereof, and having presented his assignment of errors and prayer for reversal and his statement as to the jurisdiction of the Supreme Court of the United States on appeal pursuant to the statutes and rules of the Supreme Court of the United States in such cases made and provided; now, therefore, it is hereby

Ordered that said appeal be and the same hereby is allowed as prayed for; and it is further

Ordered, pursuant to 28 U.S.C. Supp. IV § 2408, an appeal bond for costs is not required of the Secretary of Agriculture, said Secretary being an officer supervising and controlling a department of the United States; and it is further

[fol. 1025] Ordered, that the Clerk of this Court, shall, within forty (40) days from this date, prepare, certify, and transmit to the Clerk of the Supreme Court of the United States a transcript of the material parts of the record in this cause, which shall be designated by praecipe or stipulation of the appellant Secretary of Agriculture and counsel herein; and it is further

Ordered that a citation shall issue in accordance with law.

William E. Steckler, United States District Judge.

Dated: March 27, 1952.

[fol. 1026] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL—Filed March 27, 1952

The Secretary of Agriculture, intervening plaintiff in the above-entitled action, in connection with his appeal to the Supreme Court of the United States, hereby files the following assignment of errors upon which he will rely in

prosecuting his appeal from the final judgment of the District Court entered on February 11, 1952.

The District Court erred:

1. In holding that the Interstate Commerce Commission has authority under §§ 202(a), 203(a)(14) and (15), and 204 of the Interstate Commerce Act to issue rules forbidding the long established practice of trip-leasing and restricting the right of Commission-regulated carriers to utilize leased equipment in conducting their operations.

2. In failing to hold and conclude that the rules prescribed by the Commission contravene § 203(b)(4a), (5), and (6) of the Interstate Commerce Act providing for [fol. 1027] partial exemption from Commission regulation for motor vehicles transporting agricultural commodities and farm supplies.

3. In failing to hold and conclude that the rules prescribed by the Commission are arbitrary, unreasonable and null and void in that they virtually nullify the agricultural exemptions contained in § 203(b)(4a), and (5) and (6) of the Interstate Commerce Act.

4. In holding that the rules prescribed by the Commission do not contravene §§ 208(a) and 209(b) of the Interstate Commerce Act which bar the Commission from restricting the rights of motor carriers to add to their equipment and facilities.

5. In holding that the order of the Commission and the rules prescribed therein are not violative of the National Transportation Policy preceding § 1 of the Interstate Commerce Act.

6. In holding that the order of the Commission and the rules prescribed therein are not an arbitrary and unreasonable exercise of authority by the Commission.

7. In failing to set aside, annul, and permanently enjoin the order of the Interstate Commerce Commission issued on May 8, 1951, in "Ex Parte No. MC-43, Lease and Interchange of Vehicles by Motor Carriers."

8. In holding that the evidence before the Interstate Commerce Commission supports its findings as to the necessity of regulation of leasing practices.

9. In holding that the Interstate Commerce Commission's

order was not based on a mistake of law or a misapplication of proper statutory standards.

[fols. 1028-1077] Wherefore, the Secretary of Agriculture of the United States petitions that the final order and decree of the District Court be reversed, that judgment be entered setting aside, enjoining, and annulling the Interstate Commerce Commission's order of May 8, 1951, in so far as it forbids the long established practice of trip-leasing agricultural exempt vehicles, and for such other relief as the Court may deem proper.

Respectfully submitted, (s) W. Carroll Hunter, Neil Brooks, Associate Solicitor, Henry A. Cockrum, Richard C. Johnson, Attorneys for the U. S. Department of Agriculture.

Dated: March 24, 1952, Washington, D. C.

[fol. 1077a] [Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 1077b] SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 709

EASTERN MOTOR EXPRESS, INC., A.C.E. TRANSPORTATION Company, Inc., The Akron-Chicago Transportation Company, Incorporated, et al., Appellants,

vs.

THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, et al.

STATEMENT OF POINTS TO BE RELIED ON—Filed May 22, 1951

I. Eastern Motor Express, Inc., A.C.E. Transportation Company, Inc., the Akron-Chicago Transportation Company, Incorporated, et al., Appellants in the above-entitled cause, hereby adopt for their statement of points upon

which they intend to rely in their appeal to this Court the points contained in their Assignment of Errors filed herein.

Designation of Parts of Record to be printed [Omitted in printing].

[fol. 1077c] SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 710

SECRETARY OF AGRICULTURE OF THE UNITED STATES, Appellant,

v.

UNITED STATES OF AMERICA, and INTERSTATE COMMERCE COMMISSION, et al, Appellees.

STATEMENT OF POINTS TO BE RELIED ON—Filed June 13, 1952

a. The Secretary of Agriculture of the United States, appellant in the above-entitled cause, hereby adopts for his statement of points upon which he intends to rely in brief and oral argument, in his appeal to this Court, the points contained in his Assignment of Errors filed herein.

Designation of Parts of Record to be printed [Omitted in printing].

[fol. 1077d] SUPREME COURT OF THE UNITED STATES

October Term, 1952

No. 26

AMERICAN TRUCKING ASSOCIATIONS, INC., et al.,

No. 35

EASTERN MOTOR EXPRESS, INC., A.C.E. TRANSPORTATION COMPANY, INC., THE AKRON-CHICAGO TRANSPORTATION COMPANY, INCORPORATED, et al.

No. 36

SECRETARY OF AGRICULTURE OF THE UNITED STATES, Appellants

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, et al.

STIPULATION OF CERTAIN PARTIES IN THE ABOVE ENTITLED CASES RELATIVE TO PRINTING OF THE RECORD

I. Statement

All of the above entitled cases are appeals from decisions of United States District Courts involving the validity of a certain order of the Interstate Commerce Commission. The appellants in each case, in compliance with the rules of this Court, have designated the portions of the record they desire to have printed. In preparing these designations counsel for appellants carefully screened the records in the Courts below so as to omit any non-essential or unimportant portions thereof. The principal portion of each record in the Courts below consists of the official transcript of hearings before the Interstate Commerce Commission and exhibits before the Commission. This portion of the record was carefully reviewed by appellants and arguments of counsel, discussions, etc., which would not be informative to this Court were deleted in the portions of the record

designated for printing. The only exception as to the nature of the matter omitted from the record before the Commission is a portion concerning household goods carriers involving separate questions and which was omitted as not being necessary for decision of any of the issues here.

[fol. 1077e] It appears that the designation of portions of the record to be printed met with substantial approval by counsel for appellees, since the only additions to the record requested by appellees were two additional exhibits before the Interstate Commerce Commission. In the Eastern Motor Express, Inc., case appellant immediately requested the Clerk to include these two exhibits as a part of the appellant's original designation of the record to be printed. In the American Trucking Associations, Inc., case the designation of the record to be printed was filed subsequent to that in the Eastern Motor Express, Inc., case and the two additional exhibits desired by the appellees were included therein.

As the matter now stands, the portions of the record to be printed in all three cases relating to the record and exhibits before the Interstate Commerce Commission, are identical except that in the American Trucking Associations case one exhibit is included, to wit, Interstate Commerce Commission Exhibit No. 40, which was not in evidence in the Eastern Motor Express case. (In the event one printing of certain portions of the records is carried out as suggested later herein, this Exhibit No. 40, which is not common to the three records, should be included.)

It is the desire of the appellants that in the printing of the record, the proceedings had in the United States District Court for the Northern District of Alabama, and in the United States District Court for the Southern District of Indiana, Indianapolis Division, which have been designated and which relate to the individual cases, be printed separately as designated. It is the belief of the appellants, however, that one printing of that portion of the record in each case, which consists of portions of the record and certain of the exhibits before the Interstate Commerce Commission would be to the best interest of all concerned, thereby conserving the time of the Clerk of the Court in

the preparation and printing thereof and in making the same more readily available for examination by this Court.

In view of this belief, we are submitting herewith a stipulation of the parties as follows:

[fol. 1077f] II. Stipulation

It Is Stipulated and Agreed by and between the appellants in American Trucking Associations, Inc., et al., case No. 26; Eastern Motor Express, Inc., A. C. E. Transportation Compay, Inc., The Akron-Chicago Transportation Company Incorporated, et al., case No. 35; and Secretary of Agriculture of the United States, case No. 36, and the following named appellees and interveners as follows:

That the Clerk of the Supreme Court of the United States, in printing the record in the above entitled cases may, insofar as the record in said cases consists of portions of the record and certain of the exhibits submitted before the Interstate Commerce Commission in the original proceedings had prior to the entry of the order complained of, print said record only once, making it available to the Court in all three cases and printing separately in each of the three cases the matters particularly designated for printing therein which are not common to the three cases.

The separate appellants are to be responsible for the cost of printing the separate portions of the record in the three cases designated by them and the cost of the one printing of portions of the Commission record and exhibits is to be apportioned equally among the appellants in the three cases on the basis of one-third thereof to the appellants in each case, it being agreed and understood, however, that if the Secretary of Agriculture is unable by reason of Government regulations, to pay his portion of the cost of the one printing of the portions of the common record, that the cost of such printing is to be equally divided between the appellants in American Trucking Association, Inc., case and Eastern Motor Express, Inc., case on the basis of one-half thereof to the appellants in each case.

It is further stipulated and agreed by and between the parties hereto that this stipulation is solely for the purpose of facilitating and simplifying the printing of the record and that by agreeing thereto no party waives any

question of law or fact heretofore raised by such party in these proceedings.

[fol. 1077g] It is further stipulated between the parties hereto that this agreement shall not affect the right of parties to refer, either in brief or oral argument, to any exhibit which is a part of the record on file with the Court but not printed.

June 27, 1952.

(s) Edward M. Reidy, Attorney for Interstate Commerce Commission, Philip B. Perlman, Solicitor General, B. K. Wheeler, Attorney for International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Carl Helmetag, Jr., Attorney for Railroads, Harry E. Boot, Attorney for Appellants, American Trucking Associations, Inc., et al., Neil Brooks, Attorney for Appellant Secretary of Agriculture of the United States, Howell Ellis, Attorney for Appellants, Eastern Motor Express, Inc., A.C.E. Transportation Company, Inc., The Akron-Chicago Transportation Company, Incorporated, et al.

[fol. 1077h] PROOF OF SERVICE

[Omitted in printing]

[fol. 1077i] SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 709

EASTERN MOTOR EXPRESS, INC., et al., Appellants

vs.

THE UNITED STATES OF AMERICA et al.

ORDER NOTING PROBABLE JURISDICTION—May 12, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdic-

tion is noted and the case is assigned for argument with No. 647, American Trucking Associations, Inc. vs. United States.

[fol. 1077j] SUPREME COURT OF THE UNITED STATES

October Term, 1951

No. 710

THE SECRETARY OF AGRICULTURE OF THE UNITED STATES, Appellant,

vs.

THE UNITED STATES OF AMERICA et al.

ORDER NOTING PROBABLE JURISDICTION—May 12, 1952

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is assigned for argument with No. 647, American Trucking Associations, Inc. vs. United States.

(3245)